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DOES SUBSIDIARITY REALLY MATTER ?

Renaud Dehousse*

History is unpredictable. 1992 was to crown eight years of hard labour of the Community institutions, with the completion of the internal market and the launching of the European Union. Instead, the Community has been caught in one of the most severe crises it has ever had to face. The rejection of the Maastricht Treaty by the Danish people and the narrow victory of the "yes" vote in the French referendum have shown that European integration was meeting with stronger resistance than expected at national level, while the monetary crisis of mid-September has cast a shadow on the prospects for monetary union.

In this difficult situation, the subsidiarity concept appears as a cure for all the problems now faced by the Community. Today's political discourse is replete with references to the spirit and letter of subsidiarity. Encouraged by its recognition in the Maastricht Treaty, the Community institutions have engaged into a discussion on how such a principle could be given effect. The expectation

* European University Institute, Florence, Italy. I am indebted to a number of persons for their comments and suggestions on earlier versions of this article. I wish to thank in particular Mr. Emile Noël, Principal of the European University Institute, Professors Brian Bercusson, Christian Joerges and Giandomenico Majone from the EUI, and Professor Joseph Weiler from Harvard Law School. I am also grateful to Michelle Everson, Research Associate at the EUI, for her assistance in revising this paper. Not all of them shared the views expressed in this piece; I alone am responsible for any shortcomings.

seems to be that this will help the Community to steer a new course in the years to come.

Yet there is still no clear understanding of the actual scope of the subsidiarity principle, nor of the ways in which it could be used by the Community institutions. The aim of this article is to contribute to the debate on these two issues. Before examining the merits of the discussion, it is however useful to analyse the reasons that have led to the insertion of subsidiarity in the Treaty on European Union.

I. From Subsidiary to Principal: The Rise of the Subsidiarity Principle

The emergence of the subsidiarity principle, which has rapidly gained fame in Community circles, is a story worth telling.¹ As is now widely known, the concept of subsidiarity has ancient roots in European political philosophy. It was mostly invoked - amongst others by the catholic church - as a general principle of social organization, to protect the private sphere against any undue interference from the state, the latter being called upon to intervene only when action by private parties was unable to reach certain objectives. In some federal systems, the same principle was used as a "rule of reason"², to draw a line

¹See V. Constantinesco, *La distribution des pouvoirs entre la Communauté et ses Etats membres: l'équilibre mouvant de la compétence législative et le principe de subsidiarité*, report presented at the conference on "The Institutions of the European Community after the Single European Act: The New Procedures and the Capacity to Act. Balance Sheet and Perspectives in View of the Intergovernmental Conferences", Bruges, 1990; M. Wilke and H. Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community*, RIIA Discussion Paper N. 27 (1990).

²Constantinesco, "La subsidiarité comme principe constitutionnel de l'intégration européenne", *Aussenwirtschaft* (1991) 439-459 at 447.

between the respective competences of the center and the component units: preference was to be given to action at a level as close as possible to the citizen.³

Although some elements of the Community's institutional structure bore some resemblance to this approach,⁴ the concept was not used as such in reference to the Community until very recently. Given the Member States' near total control over the decision-making process, it was difficult to argue that their sovereign powers were really endangered by European integration. However, things were to change with the Single European Act, which provided one at the same time for a broadening of the Community's sphere of competence, and for a more systematic use of majority voting: not only was the Community increasingly to intervene in areas such as culture or environmental protection, where subnational bodies have traditionally been active but, equally importantly, it was now at times able to bypass the opposition of one or a few Member

³Article 72 (II) of the German Basic Law, for instance, provides that

"The Federation shall have the right to legislate in ... matters [of concurrent competence] to the extent that a need for regulation by federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Länder, or
2. the regulation of a matter by a Land law might prejudice the interest of other Länder or of the people as a whole, or
3. the maintenance of legal or economic uniformity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation." Translation in A. Blaustein and G. Flanz (eds.), *Constitutions of the Countries of the World*, (August 1991) at 110.

⁴See Kapteyn, "Community Law and the Principle of Subsidiarity", *Revue des affaires européennes* (1991) 35-43 at 38-39, who cites among other elements Article 235 of the EEC Treaty, the use of directives, which "leave to the national authorities the choice of forms and methods" whereby their objectives should be achieved (Article 189), the principle of proportionality. See also Constantinesco, *supra* note 31 and the report on the subsidiarity principle prepared by Mr. Giscard d'Estaing for the Institutional Committee of the European Parliament, Doc. EP A3-163/90 of 22 June and 4 July 1990.

States. This combined development⁵ offers a good illustration of the links existing between the vertical and the horizontal dimensions of federalism, discussed above. For the first time in the history of the Community, the fear of a centralist drift, occasionally inflamed by the behaviour of Community institutions⁶, became more than a rhetorical statement in the mouths of a handful of politicians.

Centre-periphery problems of this kind are common in federal systems. Yet, at Community level, the problem is made somewhat more acute by the fact that the Community enjoys a *functional* competence: several provisions enable it to take whatever measure needed to establish a common market (Articles 100 and 100A) or simply to achieve "objectives of the Community" (Article 235). This has made possible a number of incursions into fields where the Community had not been granted a formal competence - hence the gradual extension of Community activities that was noted from the 1970s onwards.

In this context, the idea of assigning clear limits to the growth of Community powers rapidly gained ground. Unsurprisingly, the Single Act contained a first reference to the subsidiarity principle: in the field of environmental policy, the Community was to act only "to the extent that the objectives [of environmental policy] can be attained better at Community level

⁵The importance of which is stressed in Weiler, "The Transformation of Europe", 100 *Yale Law Journal* (1991) 2403-2483.

⁶See the criticisms of Hailbronner, "Legal Institutional Reform of the EEC: What can we Learn from Federalism Theory and Practice?", *Aussenwirtschaft* (1991) 485-496. The fears of the German *Länder* were expressed forcefully in the *Bundesrat* at the time of ratification of the Single Act. See Hrbek, "The German *Länder* and the European Community. Towards a Real Federalism?" in W. Wessels and E. Regelsberger (eds.), *The Federal Republic of Germany and the European Community: The Presidency and Beyond* (1988) 215.

than at the level of the individual Member States"⁷. Representatives of European regions subsequently claimed that subsidiarity should be enshrined within the treaty, while they should be granted the power to initiate proceedings against Community acts adopted in violation of this principle.⁸ In the course of the intergovernmental conference, the idea of formal recognition was supported both by the Commission, eager to give evidence of its own moderation, and by some Member States, alarmed by the seemingly endless growth of Community powers. For a majority of actors in the Community process, subsidiarity had thus become a principal concern.

This broad consensus was not flawless, and occasionally led to curious contrasts: the implications of subsidiarity in the field of monetary policy were, for example, radically opposed, depending on whether they were identified by the United Kingdom or by the Commission.⁹ Be that as it may, the convergence of divergent interests once again had a strong impact on the outcome of the negotiations. The very first provision of the Maastricht Treaty states that decisions are to be taken "as closely as possible to the citizen". How this result is to be achieved is explained in Article 3B, which formally establishes two rules which up to now had enjoyed the status of general principles of Community constitutional law: the principle of attributed powers¹⁰ and the

⁷Article 130R (4).

⁸See the motion adopted by the Assembly of European Regions in December 1990, *Regions of Europe* (2/1990) at 56-59.

⁹See F. Dehousse, "La subsidiarité, fondement constitutionnel ou paravent politique de l'Union européenne?", *Liber Amicorum E. Krings* (1990) 51-59.

¹⁰"The Community shall act within the limits conferred upon it by this Treaty and of the objectives assigned to it therein."

principle of proportionality¹¹. Subsidiarity proper is defined in paragraph 2 of the same provision, which is worth quoting in full as the wording is of importance:

"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

The redundancies in these few statements hint at just how eager national governments were to protect their prerogatives against any undesired Community intrusion. This concern is also reflected in the wording of Article 3B. In theory, subsidiarity could have been used as a double-edged sword: negatively, to protect Member States' prerogatives against undue Community interference; but also positively, to allow the Community to act should such action appear necessary.¹² Yet, only the negative formulation was retained in the final version: as it stands, Article 3B might be invoked to regulate the use the Community makes of its competences, but not to grant it additional powers.¹³ This, it is submitted, is a precise resumé of the political objectives this provision is meant to achieve.

¹¹"Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

¹²Such was the spirit of Article 235, as underlined among others by President Delors in an address at the European Institute of Public Administration. See "Le principe de subsidiarité: contribution au débat" in *Subsidiarité: défi du changement* (1991) 7-19.

¹³This negative overtone was reinforced during the intergovernmental conference. The conclusions of the Rome European Council acknowledged that subsidiarity could justify an extension of Community competence (see *Bull. EC* 12-1990 at 11). The draft circulated by the Luxembourg Presidency contained a milder version of Article 3B, according to which the Community could act "if and insofar as those objectives can be better achieved by the Community than by the member States acting separately". The Luxembourg draft has been reprinted in *Europe Documents* N. 1722/1723 of 5 July 1991.

II. The Subsidiarity Tests of Article 3B

The scope of Article 3B confirms the above interpretation. Firstly, although subsidiarity has been raised to the level of general principle of the European Union, Article 3B appears in the EC Treaty rather than in the common provisions, which suggests that Community competences were the primary target. Secondly, the use by the Community of its exclusive competences is not governed by the subsidiarity principle. This seems logical: whenever the Community is under an obligation to act, and the Member States are deprived of the necessary powers, there can be no question of subsidiarity. The demarcation of competences is determined by the Treaty itself, and the principle of attributed powers - reaffirmed in the first paragraph of Article 3B - is designed to protect the Member States against too generous a reading of Community powers.

Subsidiarity proper will therefore be of importance in relation to powers that are shared between the Community and the Member States. At first sight, Article 3B seems to envisage a twofold "subsidiarity" test:

- in the first place, attention must be paid to the means available at national level, to see whether they might suffice to attain the objectives of the measure which is envisaged at Community level. This may entail a review of financial resources as well as legal instruments, of potential as well as existing measures.
- the second test entails an evaluation of the envisaged Community action, in order to determine whether "by reason of the scale or the effects of the proposed

action", its objectives can be "better achieved" at Community level. This is what the Commission has labelled a "value added test"¹⁴.

These two tests seem to refer to two different types of operation. The first appears closer to a mere *effectiveness* test: if action at national level is capable of producing the desired result, it should be given preference. In contrast, the second test is more concerned about *efficiency* matters: the reference to the fact that the objective has to be "better achieved" at Community level can be seen as a indication that a comparative evaluation of the costs and benefits of action at Community and at national level is required.

It has been suggested that each of these two conditions are to be satisfied before the Community might act.¹⁵ But the two tests cannot be combined in a mechanical fashion. If one opts for the effectiveness test, two things are possible: either action at national level can be effective, and the Member States should act, or it is not. In this latter case, adding a separate efficiency condition does not really make sense: provided it itself is effective, Community action is likely to be more efficient than ineffective national measures.

The legislative history of Article 3B may aid to understand how this ambiguous result was reached. The Luxembourg draft referred to "objectives ... better achieved by the Community than by the Member States acting separately".¹⁶ This suggests that the Member States had in mind a comparative

¹⁴The Principle of Subsidiarity, Communication of the Commission to the Council and the European Parliament, Doc. SEC(92)1990 final of 27 October 1992 at p. 10 of the annex.

¹⁵See the memorandum on subsidiarity presented by the Federal Republic of Germany, reported in *Agence Europe* of 12-13 October 1992 at 13-14.

¹⁶See *supra* note 13.

assessment of national and Community measures, which can only be done through an evaluation of their respective efficiency. As indicated above, some felt it necessary to strengthen this wording by indicating that in such a case that national action proved "sufficient" to attain the pursued objective (read: where it would be as efficient as the proposed Community action), it should be given preference.

Thus, rather than two distinct conditions, what we have here are but two facets of the same problem, effectiveness being a necessary component of the efficiency assessment which subsidiarity entails. Naturally, the complexity of the exercise has clear implications for the way the subsidiarity principle is to be implemented.

III. Implementing Subsidiarity

Article 3b has already given rise to a fierce debate on the implementation of the subsidiarity principle. Is it "justiciable", i.e. could the European Court of Justice annul a Community act on the basis of an infraction against the subsidiarity principle? Should it assume such a delicate duty? Are there any alternatives to judicial implementation? I shall deal with these three questions in succession.

Before doing so, however, a word of caution is necessary, for law is rarely as neutral as it claims to be, and the answers that most naturally come to mind are often inspired by political-institutional preferences. Hidden normative statements then tend to obfuscate the discussion. In my view, the best way to facilitate the debate is to eschew a supposedly "neutral" viewpoint, according to which problems are treated as if they were essentially technical ones, and rather

to spell out as clearly as possible the kind of considerations that underlie our reasonings. This is what I shall try to do in the following pages.

1. *Is Subsidiarity Justiciable?*

That subsidiarity could be invoked in annulment proceedings against Community acts is beyond doubt. During the intergovernmental conference, thought had been given to the idea of referring to subsidiarity in the preamble of the Treaty. Yet, as we saw, another solution prevailed and subsidiarity, being mentioned in body of the Treaty, is to be regarded as binding on all Community institutions. Any violation of the principle could therefore serve as a basis for an annulment proceeding based on Article 173 of the EC Treaty. A Member State having unsuccessfully opposed the adoption of a given measure, which it deemed to be in conflict with the subsidiarity principle, could thus subsequently bring the matter before the Court.

However, it is far from certain in my view that private parties could do so, for the Court might find it difficult to regard Article 3b as sufficiently clear and precise to enjoy direct effect. In the past, it has denied direct effect to Treaty provisions that leave a wide discretion to Community institutions.¹⁷ Such is undoubtedly the case of Article 3b, the ambiguities of which are discussed above.

¹⁷See for instance case 74/76, *Iannelli v. Meroni*, [1977] ECR 557 as regards state aids. While admitting the difficulty, Sir Leon Brittan, Vice-President of the EC Commission, has expressed the hope that Article 3b will one day be held directly applicable. See the text of his Robert Schuman lecture at the European University Institute, *Europe Documents* N. 1786 of 18 June 1992 at 3.

In spite of this reservation, it seems likely that the Court will one day be confronted with a subsidiarity problem. How will it tackle it?

The difficulty is twofold. From a functional viewpoint, it is not clear that the Court is equipped to answer the question it would be asked. From a political viewpoint, a ruling on the compatibility of a given measure with the subsidiarity principle could create a legitimacy problem. Although the two problems are closely intertwined, it is better to treat them separately.

a) The Functional Issue

Subsidiarity as defined by the Treaty is a complex issue, which goes beyond classical competence problem, in relation to which courts must rule on the compatibility of a measure with rules governing the division of power between the center and the periphery. Rather, what would be required of the Court is an assessment of the adequacy of the means used to reach a given end: was Community action really necessary to achieve the objectives of the challenged measure, or would action at national level have represented a valid alternative?

The answer to such a question involves a delicate qualitative assessment, and the parameters to be used are far from clear. Suppose for instance that the Council were to set up a programme providing for financial assistance for projects aiming to increase the mobility of school teachers. At first sight, such a measure would seem to fall squarely within the limitative framework of Article 126. Assume further, however, that the validity of this programme were to be challenged by one Member State, arguing that Community action was not

necessary since the same objective could equally have been achieved by the Member States, either acting individually or pooling their resources to finance specific programmes, and that the Community had therefore violated the subsidiarity principle.

How could the Court assess the merits of such claim? This would differ greatly from traditional litigation on the demarcation of competences, as the Court would be unable to refer to a superior norm, against which the validity of Community action could be checked.

Article 3b seems to suggest that the Court should attempt to determine whether national action would have been sufficient. But what sort of parameters should it use in order to ascertain the efficiency of national measures, some of which might even exist in project form only?

Even assuming that the Court were able to overcome this first difficulty, on what basis would it then further decide whether national actions would be "sufficiently" efficient to attain the objectives of the measure under scrutiny? Obviously, this involves more than an effectiveness assessment. What would be required is a careful weighing up of the costs and the benefits of the proposed Community measure, when compared with those of national action.

Article 3B indicates that in the evaluation process, due regard should be paid to "the scale of effects of the proposed action". The first criterion may be understood as a reference to the transfrontier dimensions of a given problem. As regards the second one, the Commission has suggested also considering such

factors as the costs of inaction, or the need to reach a critical mass.¹⁸ But, leaving these attempts to provide objective criteria aside, what will ultimately be needed is a ruling on the compared efficiency of both types of measure.

Is this really a task which can be fulfilled by a judicial body? Will the Court have at its disposal the necessary elements to provide an answer? It would, of course, be able to rely on the submissions of private parties, but these are likely to contain considerations informed by political opportunism than by scientific evidence. And the problem is made even more complex by the relativity of the efficiency concept: costs and benefits might be different for all interested parties. Suppose for instance that the costs of the proposed Community action are found to be evenly distributed among the Member States, while its benefits accrue only to some of them. Will the fact that inaction would entail even greater costs be deemed sufficient to justify Community action?

In other words, a subsidiarity assessment appears to involve delicate policy choices, which go beyond the tasks traditionally assigned to judicial bodies.¹⁹

Vigorously pleading in favour of justiciability, Jacqu  and Weiler have invoked an analogy with the proportionality principle to suggest that the

¹⁸Communication on the subsidiarity principle, *supra* note 14 at 10.

¹⁹See however Kapteyn, *supra* note 4 at 40, who argues that criteria such as a "more effective attainment" or the "cross-boundary dimension or effect" or a given problem "can be the subject of a discussion based on more objective criteria of an economic, social, technical or legal nature".

European Court of Justice had already touched upon similar issues on other occasions.²⁰

The similarity is indeed striking: both principles are used in order to regulate the use of Community competences, with a view to limiting any encroachment upon certain elements which are given a "superior" value: fundamental rights and basic freedoms contained in the Treaty in the case of the proportionality principle, Member States' competences in the case of the subsidiarity principle. Both principles also require an assessment of the appropriateness of the means used to reach a given end.

Yet, the parallel is by no means complete. Proportionality problems are essentially limited to a question of means and ends: could not other measures, equally effective but less detrimental to superior interests, have been used? In contrast, as I have tried to show, subsidiarity problems involve a difficult efficiency assessment. Moreover, the efficiency of Community measures is to be assessed *relatively*, in comparison with that of alternative national measures. The Commission has even suggested that proportionality is but one dimension of any subsidiarity assessment;²¹ it is indeed likely that a Community intervention going beyond what is necessary to achieve one objective of the Treaty would not be found to be efficient. All this makes the subsidiarity review a far more delicate exercise - politically as well as functionally.

²⁰Jacqué and Weiler, "On the Road to European Union - A New Judicial Architecture", 27 *CML Rev.* (1991) 185-207.

²¹Communication on the subsidiarity principle, *supra* note 14 at 5.

Despite this important difference, the Court's jurisprudence on the proportionality principle is highly instructive.²² Two elements are worthy of particular attention. Firstly, although the scope of the principle has gradually been expanded to cover the entire field of Community law, including rules adopted by the Council and the Commission as well as individual administrative decisions, the vast majority of measures subjected to review have been Commission regulations, "which can be said to straddle the border between the creation of legal rules and the adoption of administrative measures".²³ The way the Court has undertaken this review is equally interesting. In assessing whether a Community measure was suited to the purpose of achieving the objective pursued, the Court has always shown great caution when the Treaty provided the Community legislator with a wide margin of discretion; it has generally confined itself to examining whether the measure at issue was "obviously inappropriate for the realisation of the desired objective".²⁴ This clearly suggests that the Court, being aware of the difficulty involved in determining the effectiveness of a given measure, was reluctant to substitute its own appreciation for that of the Community legislator, excepting those cases of blatant unsuitability.

The Court has showed a similar reticence on other occasions. In the notorious *ERTA* case²⁵, the Court ruled that it was for the Council, when acting on the basis of Article 235, to determine when Community action was in fact "necessary" to attain one of the Community's objectives. Likewise, in case

²²See J. Schwarze, *European Administrative Law* (1992) at 708-866 for a detailed review.

²³*Ibid.*, at 861.

²⁴Case 40/70, *Schroeder v. Germany* [1973] ECR 138 at 142.

²⁵Case 22/70, *Commission v. Council*, [1971] ECR 263.

276/80,²⁶ it was asked to rule that, by establishing quotas to combat against the steel crisis of the late 1970s, the Commission had infringed Art 58 (1) of the ECSC Treaty, which provides that quotas should be used as an *ultima ratio*. The plaintiff argued that Article 57, which invites the Commission to give preference to "the indirect means of action at its disposal, such as ... cooperation with Governments to regularize or influence general consumption" or intervention in regard to prices, provided sufficient means to deal with the crisis. In other words, the Court was confronted with a kind of subsidiarity challenge *ante litteram*. In its ruling, it simply noted that

[i]n the event of a manifest crisis Article 58 of the ECSC Treaty confers upon the Commission a wide power of appraisal which it exercised in adopting Decision No 2794/80/ECSC. The Commission has set out the reasons for which it considered that the means of action provided for in Article 57 were not sufficient to deal with the crisis. It considered that it could not take steps to influence general consumption in the present economic situation. (...) The Commission accordingly concluded that the indirect means of action at its disposal had proved insufficient and that it was necessary to intervene directly in order to restore the balance between supply and demand. In arriving at this conclusion the Commission did not exceed the limits to its power of appraisal and the submission must therefore be rejected."²⁷

Thus, the Court seems to have considered that, the Commission having complied with the (formal) requirement of a statement of the reasons on which its actions were based, all it could do itself as concerns the merits of the problem was to make sure the Commission had acted within the limits of its powers. This reasoning had been explicitly developed in an earlier case,

²⁶*Ferriera Padana v. Commission*, [1982] ECR 517.

²⁷*Ibid.* at 540.

where the validity of a Commission regulation modifying monetary compensatory amounts following the temporary withdrawal of the French franc from the European monetary "snake" was questioned:

"As the evaluation of a complex economic situation is involved, the Commission and the Management Committee enjoy, in this respect, a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion."²⁸

This line of reasoning suggests that where the Treaty leaves a margin of discretion to other Community institutions, the Court is not eager to substitute its own interpretation for theirs. If such a line is maintained, the Court will approach with great caution any discussion on the conformity of Community measures with the subsidiarity principle, and leave a large measure of discretion to the institutions that must decide on the matter; only in exceptional circumstances would its scrutiny lead to a negative judgement.²⁹

b. The Legitimacy Issue

What the Court will do will in the last instance depends on how it conceives of its institutional mission. In this respect, the fact that the subsidiarity principle has been enshrined in the body of the Treaty is likely to carry some weight. In doing so, did not the Member States implicitly invite the Court to

²⁸Case 29/77, *Roquette v. France*, [1977] ECR 1835, recitals 19 and 20. See also case 42/84, *Remia-Nutricia* [1985] ECR 2545, recital 43.

²⁹See Kapteyn, *supra*, note 4 at 41. See also Mischo, "Un nouveau rôle pour la Cour de Justice?", *RMC* (1990) 681-686.

come to grips with the problem? Alternately, enforcing the subsidiarity principle might be prove difficult for a Court that has systematically construed Treaty provisions in a broad manner, having regard to their purposes and to the overall objectives of the Treaty³⁰. Clearly, teleological interpretation and subsidiarity are inspired by diametrically considerations, and will be difficult to reconcile.

Removing now from the analytical to the, more delicate, level of normative consideration, I should submit that the Court would be well advised to stick to the cautious approach it has followed in the past. Such a view is of course influenced by the above analysis: if subsidiarity is primarily a political problem, as I believe it is, judicial solutions may create a legitimacy problem. Assuming that a majority of Member States - or even all of them - have assessed the relative efficiency of various modes of action, and decided upon the course to be followed, would it be legitimate for the Court to impose a different evaluation of such action?

The upholders of justiciability have stressed that there have been many examples of courts having been called upon to exert a creative role when implementing general principles to politically delicate issues. After all, deciding when life begins in matters of abortion is no less difficult a task than deciding at which level a given measure is more effective; yet, courts have often been entrusted with these tasks.³¹

³⁰For an recent example of a this trend, see opinion 1/91 of 14 December 1991 (EEA Agreement), not yet reported, and the comments of Brandtner, "The 'Drama' of the EEA: Comments on Opinions 1/91 and 1/92" 3 *EJIL* (1992) 300-328

³¹This is the example used by Jacqué and Weiler, *supra* note 20 at 205.

This is of course true, but the analogy is not entirely convincing. Firstly, it would be easy to show that the legitimacy of such decisions has been questioned, at times vehemently. Secondly, European states have strongly contrasting views as to the rôle of the judiciary. Several of them were powerfully influenced by the political philosophy of the Enlightenment, which insisted on keeping judges away from politics in the name of the separation of powers. Even if constitutional justice has made considerable headway in post-World War II Europe, judicial review of the constitutionality of legislative acts remain limited in several Member States of the Community. Thirdly, and perhaps more importantly, even assuming that where courts undertake such delicate tasks, their own legitimacy is well established, it is far from sure that the intervention of the European Court of Justice would be regarded equally benevolently. Recent evidence suggests that many Irish citizens had more faith in their own High Court than in the Luxembourg Court when it came to dealing with the abortion issue. There is, in other words, a serious risk that, by intervening in discussions of a clearly political nature, the European Court of Justice would awaken the ghost of a "gouvernement des juges", in a Community which is already under strong attack for its legitimacy deficit.

Turning to federal systems, one notices that courts have often showed great caution in deploying the legal instruments put at their disposal to protect the prerogatives of component units. This is all the more interesting as some of these instruments would have appeared to be easier to handle than is Article 3b. The Tenth Amendment of the United States' Constitution, for instance, states that

"[t]he powers not delegated to the United states by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Although clearly attuned to the subsidiarity principle, this provision might have been more readily used by courts, as it does not entail any effectiveness assessment. Yet, after having hesitated for a while, the Supreme Court of the United States has refused to see in this clause an instrument delineating "islands of sovereignty"³² protected against any kind of federal interference.³³

The reasons which led the Court to reject this possibility are worth noting. Reporting for the majority, Justice Blackmun recalled that defining *a priori* the nature and content of limitations on federal authority under the Commerce clause had proven problematic for courts. He then added:

"It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role both in the selection both of the Executive and the Legislative Branches of the Federal Government. (...) In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in the discrete limitations on the objects of federal authority. *State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal powers.*"³⁴

This, however, should not be seen as undermining the constitutional position of the States:

"Of course, we continue to recognise that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action - the

³²L. Tribe, *Constitutional Choices* (1985) 137.

³³*Garcia v. San Antonio Metropolitan Transit Authority*, 469 US (1985) 528.

³⁴*Ibid.* at 551-552 (emphasis added).

built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the states will not be promulgated.³⁵

The Australian High Court had reached a similar conclusion -although for different reasons - as early as 1920.³⁶ In Germany, the Federal Constitutional Court has refused to give too strict an interpretation to Article 72 (II) of the Basic Law, which governs federal intervention in areas of concurrent competences.³⁷ Such a convergence would seem to give some credit to those who hold that in divided-power systems, the most effective defences against centralizing pressures are to be found in the political process, rather than in the judiciary.³⁸ If this is true for federal systems, should it not be so *a fortiori* in the Community system, where Member States enjoy greater powers? Defining at what level a task is better accomplished is primarily a political problem; it should therefore be left to the political process.

IV. Alternatives to Judicial Implementation

Rejecting justiciability does not necessarily imply that subsidiarity is condemned to remain an empty concept. Implementing the (binding) guidelines contained in Article 3b requires an effort on the part of all institutions. Thus, if

³⁵*Ibid.* at 556.

³⁶*Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*, 28 CLR (1920) 128.

³⁷see the analysis in Constantinesco, *supra* note 30.

³⁸See Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Selection and Composition of the National Government", 54 *Columbia Law Review* (1954) 543-560.

one accepts Justice Blackmun's view that protecting States' rights is primarily a matter of *process*,³⁹ the impact of this provision on the Community legislative process is potentially more important than the justiciability issue.⁴⁰

The Commission should play a central role in this respect, because it still holds a monopoly of initiative in most fields of Community competence and is, of all Community institutions, by far the best equipped to fulfill the evaluation task which is needed. One might therefore envisage the establishment within the Commission of a specialised unit, attached to the Secretariat-General, which would act as a clearing house and review all draft measures prepared by Commission services in order to assess their conformity with the subsidiarity principle.⁴¹

Procedures can play a useful rôle in ensuring the rationality of decision-making. Requiring that each Commission proposal be accompanied a specific subsidiarity assessment will provide a strong incentive to address the questions raised by Article 3B.⁴² It might even be argued that the statement of reasons imposed by Article 190 for all Community measures should lead the Commission to include in the recital of its proposals an indication of the

³⁹ *Garcia v. San Antonio*, *supra* note 33 at 554.

⁴⁰ See Brittan, *supra* note 17 at 3.

⁴¹ This proposal is developed at greater length in Dehousse, Joerges, Majone and Snyder, *Europe after 1992 - New Regulatory Strategies*, EUI Working Papers in Law, N. 92/31 at 38-41.

⁴² This possibility is contemplated in the Commission's communication on subsidiarity, *supra* note 14 at 21.

efficiency considerations that have led to their adoption.⁴³ Conformity with this formal requirement could of course be subjected to the Court's scrutiny.

Specific safeguards for Member States' interests might also be useful. They could be placed within specific procedures. The European Parliament's Draft Treaty on European Union envisaged for example that any intervention in fields previously untouched by the Community would be possible only through enactment of an organic law, with more stringent voting requirements.⁴⁴ Such is also the spirit of "old" Article 235, which requires unanimity for the Community to act when the necessary powers are not provided by the Treaty. Mechanisms of this kind would provide the Member States with means to resist unwelcome interference in their sphere of activity. They would also provide evidence of the Community's unwillingness to tolerate a creeping centralisation.

As hinted above, the most immediate threat to the principle lies in majority voting. There have been in the past instances of measures adopted by the Council (generally in the framework of internal market policy, where one can rely upon the generous wording of Article 100A) against the opposition of one or more Member States, who argued that the action envisaged went beyond what subsidiarity required.⁴⁵ No matter how rare they may be, situations of this kind feed the fear of an ever-growing Community. Obviously, the current rules of procedure of the Council, which provide that voting is possible when a

⁴³ An commitment to this effect has been taken by the Commission at the Lisboa meeting of the European Council, in June 1992.

⁴⁴ See Article 12 of the Draft Treaty. According to Article 38, organic laws would have required a qualified majority both in Council and in Parliament, whereas "normal" provisions required an absolute majority only.

⁴⁵ This was the case for directive 89/662 on cigarette labelling (OJ L359 of 8 December 1989), adopted in spite of the opposition of the British Government.

majority of members of the Council so decide⁴⁶, did not suffice to prevent this from happening. Some sort of remedy should therefore be found.

One could conceivably argue that, as unanimity represents the best possible guarantee for Member States' interests, all one should do in order to avoid this kind of problem is return to the spirit of the Luxembourg agreement, and provide that whenever one Member State deems subsidiarity to have been ignored by a proposed measure, no vote should be taken until a satisfactory compromise can be found on this point. This institutional approach would even find support in the works of some economists, who argue that unanimity is the most appropriate rule for decisions on the efficiency of public policies.⁴⁷ Yet, as no control of the use made by the Member States of this prerogative would be possible, the costs of such a solution would be likely to greatly outweigh its benefits: Community decision-making could experience anew the "lourdeur" of the pre-Single Act years, and the Community would find it more or less impossible to tackle the many problems it is now faced with.

Effective remedies should therefore steer away from the Charibdys of inaction and the Scylla of Luxembourg.

One possible solution would be to provide that when a significant minority in the Council (say, three Member States, possibly representing a minimum number of votes in the Council⁴⁸) deems a proposed measure to be

⁴⁶Article 5 of the Council's Rules of Procedure, OJ L291 of 17 October 1987.

⁴⁷This point is developed in Majone, "Le scelte pubbliche e le nuove tecnologie", *XX Amministrare* (1990) 255-292.

⁴⁸This number should however remain below the threshold needed for a blocking minority, otherwise the guarantee would be fallacious.

in conflict with the subsidiarity principle, any decision on this point is deferred for a limited period, after which the matter will be examined by the "General Affairs" Council, which will then decide according to normal procedures. Such a mechanism could even be made binding through its insertion into the rules of procedure of the Council.

Similar mechanisms exist in some federal constitutions where, in order to protect their own interests, minorities are given the right to render certain decisions more difficult by increasing the level of consensus needed for their adoption.⁴⁹ In the Community context, this solution could be viewed as an acceptable compromise by all interested parties.

On the one hand, it would provide additional guarantees to those who fear an uncontrolled growth of Community power. It has often been argued that some overregulatory tendencies were simply due to attempts by national officials to secure in Brussels decisions which they were unable to force through in their own country. Resort to a more politicized body might make this more difficult, by ensuring that the institutional dimensions of the problem are duly considered.

On the other hand, a Luxembourg-type drift would also seem less likely. Voting conditions being maintained, minority action would not entirely prevent the ultimate adoption of any measure by the Community, which would instead simply be deferred. Moreover, as several national governments would be

⁴⁹This is for instance the case of the so-called "alarm bell procedure" established by Article 38bis of the Belgian Constitution. This procedure enables three quarters of the members of one of the linguistic groups in each Chamber to prevent the adoption of a draft bill which might "have a serious effect on relations between the communities". In such a case, the procedure is suspended and the matter referred to the Council of Ministers, which comprises Flemish and French-speaking members in equal number.

required to concur in their evaluation of the proposed measure before this procedure might be used, the risk that the whole decision-making process be undermined by a systematic resort to this minority action would appear to be fairly limited. The expectation is rather that, given the various checks and balances entailed in such a mechanism, all parties would have an incentive to reach a compromise, so that the ultimate decision may be made by consensus.⁵⁰

Naturally, majority decisions might as a result be more difficult, which could somewhat slow down decision-making. This, however, would be the price to pay to implement the subsidiarity principle.

Would this suffice? Some might argue that subsidiarity should be construed as a broader principle, which aims not only to preserve a certain degree of decentralization, but also to ensure the efficiency and the equity of the policy choices that will be made at Community level. Viewed in this light, the above-mentioned mechanisms might appear biased in favour of the institutional interests of the Member States. After all, states are far from being the only actors interested in efficiency matters. Should the constitutionalization of subsidiarity operated by the Maastricht Treaty not be seen as an invitation to a bolder construction?

In my view, the answer ought to be negative. Even leaving aside the question of remedies available for such a claim, I do not believe that the resort

⁵⁰It is worth noting that although the Belgian "alarm bell" procedure referred to above was viewed as an important guarantee when it was established, it was used only once, in a relatively minor incident. It is therefore viewed by most commentators as having mainly a dissuasive effect. See e.g. A. Alen (ed.), *Treatise on Belgian Constitutional Law* (1992) at 81.

to an ultimate umpire represents an ideal solution. As indicated above, subsidiarity, because it is primarily concerned with questions of efficiency, does not lend itself to judicial treatment, save in extreme cases. Policy choices are to be made by political bodies, and not hidden behind pseudo neutral questions. The primary task of legal structures is to ensure that these choices are made on as rational and equitable a basis as possible. This result can only be achieved by an emphasis on procedures, which organize the policy process, and preserve the rights of minorities.

The emphasis on protecting Member States' interests appears more legitimate in this light. Such was after all the rationale which led to the enshrinement of subsidiarity in the Treaty, as rightly or wrongly, it was felt that the present structure contained the seeds of a centralist drift. Moreover, in subsidiarity debates, national governments are likely to be exposed to pressures from those who have an interest in the issue at hand, be it institutional (as in the case of subnational units) or substantive, as in the case of the interest groups. Granting a specific protection to states' rights goes therefore beyond the mere problem of preserving the specific interests of national governments in the Community system.

V. Conclusion: Does Subsidiarity Really Matter?⁵¹

Important as subsidiarity may be as a political issue, stimulating as the technical problems raised by its implementation undoubtedly are, its true

⁵¹This section draws largely on Dehousse, "Autonomie régionale et intégration européenne: les leçons de l'expérience communautaire", in O. Jacot-Guillarmod (ed.), *The EEA Agreement - Comments and Reflexions* (1992) at 693-705.

importance for the Community should not be exaggerated. Indeed, irrespective of the attempt to give flesh to it in the Treaty,⁵² I would argue that the subsidiarity *concept* is ill-adapted to the problems it is meant to solve.

To be understood, this remark should be viewed in relation to the overall evolution of federal systems. The traditional vision of federalism, which has for so long influenced judiciary constructs, was characterized by the view that a clear line should be drawn between the respective competences of the center and the periphery. However, this dualism has been challenged by the contemporary evolution of federal systems: the increased complexity of industrial societies and the growth of government intervention have led to a growing interpenetration between the action of both levels of government.

Institutionally, this interdependence has been reflected in the growth of intergovernmental relations. Instances of intergovernmental cooperation abound: even international relations, which are often regarded as a field of federal competence *par excellence*, are not immune from this kind of pressure.⁵³ Some have even analysed this shift from dualist to cooperative federalism as an evolution of the very concept of federalism.⁵⁴

How does all this affect subsidiarity?

⁵²In other words, the following remarks are not directly linked to the wording of Article 3b, but rather to what I regard to be the essence of the concept. This may be one of the reasons why my reading of subsidiarity is in sharp contrast with that of Cohen-Tanugi, *L'Europe en danger* (1992) at 157-169.

⁵³R. Dehousse, *Fédéralisme et relations internationales* (1991).

⁵⁴G. Sawyer, *Modern Federalism* (1976).

The answer is simple. Subsidiarity starts from the assumption that one can distinguish, in the web of functions assumed by modern states, those that should remain within the purview of lower levels, and those which should be fulfilled at a higher level. This, as I have tried to show, is no easy task. If we consider culture, we will rapidly be faced with the fact that, although culture is generally seen as a field where lower levels should be acting, it will not unfrequently take the form of an economic good to be traded across national borders. The same is true for environmental protection: although it is often a matter of local concern, some problems - acid rain, the depletion of the ozone layer - call for action at much higher levels.

Thus, one sees that, at the institutional level, the main problem is not so much to determine in an abstract fashion which authority should exercise a given function, but rather to manage interdependence among related areas. A provision dealing with free movement of cultural goods will touch both the question of free movement - for which action by the centre seems needed - and culture - which often belongs to regional competences. One may of course choose to ignore the link between these various elements of the problem but, in this case, whatever solution is likely to give right to conflicts. Forces such as technical and economic interdependence or the growth of government intervention,⁵⁵ which often make integration necessary, also make it difficult to handle a concept like subsidiarity.

⁵⁵It is often stated that government intervention was reduced during the 1980s. This may be true as regards intervention in the realm of economic policy. At the same time, however, regulatory activities in fields like environmental policy or consumer protection have significantly increased. It might therefore be argued that, far from really withdrawing, the state has simply altered its mode of intervention.

The above analysis seems to suggest that subsidiarity is a somewhat over-rated concept. Yet, rarely in the past has an institutional question attracted as much attention as the subsidiarity debate. This, in itself, is a phenomenon that deserve careful consideration.

Even if the political value of subsidiarity, as a general guideline in favour of decentralization, remains, its direct utility as a legal instrument is limited. It is doubtful that, as it currently stands in the Treaty, it could be used directly by the Court of Justice. Alternative ways to implement its philosophy are therefore needed.

Although the emphasis has so far been laid on subsidiarity as a principle governing the demarcation of competences between the Community and its Member States, I would argue that the primary problem is one of *process*. What matters is not only when the Community will act, but also how, and how these two decisions will be made. In other words, specific mechanisms should be set up to protect the Member States against undue interferences from the Community, and to provide cooperation among the various levels of authority interested in a given problem.

Be that as it may, it cannot be denied that the subsidiarity debate is in itself symptomatic of a mood which has gained strength in reaction to the growing importance of the Community. Its introduction in the Treaty should be understood as a strong political message: the Member States are not prepared to accept an unlimited extension of Community competences. The ratification debates have provided ample evidence of the fact that this view is - rightly or wrongly - shared by large sections of the Community populace. The message seems to have been clearly received by its addressees. No matter what has just

been said on its actual importance, we are therefore likely to hear more of subsidiarity.

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